

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR A TELEPHONIC
STATUS CONFERENCE TO DISCUSS CONDUCT OF JULY 28-29, 2009 *DAUBERT*
HEARING (Dkt. #2337)**

In their *Motion for a Telephonic Status Conference*, Plaintiffs ask the Court to convert the argument on the 21 pending *Daubert* motions into an evidentiary hearing. Plaintiffs also suggest a proposed order for this hearing. *See* Dkt #2337. As noted in the *Motion*, Defendants agree that Plaintiffs' proposals should be resolved in a telephonic conference (which the Court has scheduled for this Friday), but oppose both of Plaintiffs' requests on the merits. Defendants respectfully submit the following points and authorities, which demonstrate that an evidentiary hearing on the *Daubert* motions is not required and would substantially prejudice the parties and the Court.

I. An Evidentiary Hearing on *Daubert* Motions is not Required and Would Result in Substantial Delay and Prejudice

It is well settled that the decision whether to conduct an evidentiary hearing on a *Daubert* motion lies within the discretion of the District Court. The Tenth Circuit has repeatedly made clear that this Court is not required to conduct an evidentiary hearing in order to fulfill its role as gatekeeper. Rather, "[t]he district court 'has wide discretion both in deciding how to assess an expert's reliability and in making a determination of that reliability.'" *Norris v. Baxter*

Healthcare Corp., 397 F.3d 878, 883 (10th Cir. 2005) (quoting *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114, 1120 (10th Cir. 2004)). The Supreme Court has agreed, noting that “[t]he trial court must have the same kind of latitude in deciding how to test an expert’s reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether that expert’s relevant testimony is reliable.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Accordingly, “[i]t is within the discretion of the trial court to determine *how* to perform its gatekeeping function under *Daubert*.” *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000) (emphasis in original).

Plaintiffs cite *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003), for the proposition that an evidentiary hearing is required or favored. This argument is incorrect. In *Dodge*, the Tenth Circuit emphasized that the District Court has discretion in deciding what procedures to use on a *Daubert* motion, so long as the District Court receives the information it needs to evaluate the motion and make findings. *Id.* at 1223 (“The trial court’s broad discretion applies both in deciding how to assess an expert’s reliability, including what procedures to utilize in making that assessment, as well as in making the ultimate determination of reliability.”). The Tenth Circuit found an abuse of discretion in *Dodge* because the district court imposed a number of restrictions that collectively deprived the court of the information necessary to complete its gatekeeping function. Among other limitations, the district court struck a 47-page brief and appendix of several thousand pages, and allowed the movant to file only a 20-page brief and a 20-page appendix. *Id.* at 1223-24. After rejecting the written information proffered by the parties, the district court noted that it lacked sufficient information to evaluate the movant’s *Daubert* arguments and thus deferred the issues until trial. *Id.* at 1224-25. In this unusual context, the Tenth Circuit held that the “the aggregate effect of” these decisions deprived the district court of adequate information and that “although each of the court’s decisions taken by

itself might well be within its discretion, taken together, these decisions placed an unreasonable limitation on the information available to the court.” *Dodge*, 328 F.3d at 1228.

The restrictions the court imposed in *Dodge* stand in stark contrast to the proceedings in this case. The parties have filed extensive briefing, and (unlike *Dodge*), no party has sought leave for an extension of briefing limits. Unlike *Dodge*, this Court has imposed no limit on the evidentiary materials that the parties submitted with their *Daubert* briefs. In fact, the parties have submitted thousands and thousands of pages of transcripts and other documents. Additionally, this Court has already heard extensive testimony from Drs. Harwood, Olsen and Teaf, who are the principal witnesses Plaintiffs propose to call at a live hearing. *See* Ex. A (email from Plaintiffs’ counsel stating that Plaintiffs seek to present seven witnesses at the *Daubert* hearing, most of whom relate to the work of Drs. Olsen and Harwood).

In sum, the Tenth Circuit has made clear that “*Daubert* does not mandate an evidentiary hearing and [] on appeal [the Tenth Circuit] simply require[s] ‘a sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law.’” *United States v. Nichols*, 169 F.3d 1255, 1262 (10th Cir. 1999) (quoting *United States v. Call*, 129 F.3d 1402, 1405 (10th Cir. 1997)); *see also Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 249 (6th Cir. 2001) (“We find no abuse of discretion by the magistrate judge in failing to order an evidentiary hearing on the motions *in limine*. The admissibility of the testimony of [the experts] under *Daubert* was fully briefed by the parties. Further, it is clear from the extensive record and the magistrate judge’s opinion that there was an adequate basis from which to determine the reliability and validity of the experts’ opinions”). Such a record is already present in this case.

Defendants’ opposition to live testimony at the *Daubert* hearing is grounded in practical realities. Plaintiffs have informed Defendants that they seek to present seven witnesses at the

hearing. *See* Ex. A. If live testimony is to be accepted, Defendants will need to present roughly 6-7 witnesses of their own. Accordingly, if Plaintiffs' request for live testimony is granted, the *Daubert* hearing will fill at least four days of court time. Moreover, while Defendants have asked their experts to make themselves available for a *Daubert* hearing, it is not yet clear whether the defense experts will be able to cancel all of their previous commitments.

II. The Live Testimony Plaintiffs Propose is Duplicative and Barred by This Court's Rules

Plaintiffs propose to present the testimony of Drs. Harwood, Olsen, Teaf, Sadowksy, Loftis, Engle, and Hanemann. *See* Ex. A. These witnesses fall into two categories: (1) experts that Plaintiffs properly disclosed under Rule 26 and who submitted expert reports; and (2) experts who were not properly disclosed, did not submit timely expert reports, and were therefore not deposed. Drs. Sadowsky and Loftis fall into this latter category.

Accordingly, the testimony Plaintiffs propose to offer is either duplicative or inadmissible. The five experts who Plaintiffs properly disclosed (Drs. Harwood, Olsen, Teaf, Engle and Hanemann), have submitted expert reports numbering in the hundreds of pages. Under Federal Rule of Civil Procedure 26(a)(2)(B) these reports must contain "a complete statement of all opinions the witness will express and the basis and reasons for them." This Court has rejected Plaintiffs' repeated attempts to supplement their lengthy reports with additional information. Dkt #1787 ("Rule 26(e) allows supplementation of expert reports only where a disclosing party learns that its information is incorrect or incomplete [and] does not cover failures of omission because the expert did an inadequate or incomplete preparation. To construe supplementation to apply whenever a party wants to bolster or submit additional expert opinions would [wreak] havoc in docket control and amount to unlimited expert opinion preparation."). The other judges of this Court and the Tenth Circuit have agreed that experts cannot offer opinions or justifications not contained in their expert reports. *Miller v. Pfizer Inc.*,

356 F.3d 1326, 1334 (10th Cir. 2004) (“The orderly conduct of litigation demands that expert opinions reach closure.”); *Palmer et al. v. Asarco, et al.*, 2007 U.S. Dist. LEXIS 56969, 2007 WL 2254343 at *3 (N.D.Okla. Aug. 3, 2007); *Falconcrest Aviation, L.L.C. v. Bizjet Int’l Sales & Support, Inc.*, No. 03-CV-577, 2006 WL 1266447 (N.D. Okla. May 3, 2006) (citing *Anderson v. Hale*, No. CIV-02-0113-F, 2002 WL 32026151, at *2 (W.D.Okla. Nov.4, 2002) (“[T]he combined effect of Rule 26(a)(2)(B) and 37(c)(1) is that he who fails to provide a comprehensive expert report does so at his peril.”)); *see also Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597 (1993) (“Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly”). Therefore, live testimony could do nothing more than repeat the information already before the Court.

For Drs. Loftis and Sadowsky—who were not properly disclosed as experts, did not submit timely expert reports, and thus were not deposed—Defendants have filed a pending motion to exclude their testimony. *See* Dkt #2241. Their testimony is clearly inadmissible, as Defendants have been deprived of an opportunity to analyze and respond to their opinions. *See, e.g., id.*; *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F. 3d 609 (7th Cir. 2002); *Reed v. Smith & Nephew*, 527 F. Supp. 2d 1336 (W.D. Okla. 2007); *Cohlmia v. Ardent Health Servs., LLC*, 254 F.R.D. 426, 433 (N.D. Okla. 2008).

Additionally, several of the experts Plaintiffs properly identified (and who submitted timely expert reports) nevertheless submitted supplemental expert opinions long after the deadline. *See* Dkt #2241 at 18-22. In particular, Drs. Olsen and Teaf submitted late materials, despite this Court’s orders prohibiting such submissions. *See id.* Defendants have moved to strike these supplemental opinions, which were not timely disclosed and thus were not the subject of proper expert disclosures and depositions. *Id.* This issue should be resolved before these experts attempt to present live testimony on their supplemental expert opinions.

III. Plaintiffs Have Not Yet Produced the Documents Necessary for Live Testimony

The parties have a discovery dispute pending before the Magistrate Judge which should be resolved before any live *Daubert* testimony could be presented. *See Defendants' Motion to Compel Production of Materials Relating to Manuscripts From Plaintiffs' Expert Work*, Dkt. #2000. As the Court is aware, Plaintiffs submitted Dr. Harwood's work in this case to independent peer review. The peer reviewers twice rejected Dr. Harwood's work as unreliable, and provided a number of specific criticisms. *See Defendants' Motion to Exclude testimony of Dr. Valerie Harwood*, Dkt #2028. Once this happened, Plaintiffs refused to produce any further documents relating to their attempts to get peer review for their other experts' work. *See Dkt #2000*. Accordingly, documents in Plaintiffs' possession bearing on the scientific reliability of their evidence are currently being withheld. These documents would be relevant to any cross-examination of Plaintiffs' experts and, as Dr. Harwood's example demonstrates, may conclusively demonstrate that the proffered expert opinions are scientifically unreliable. Plaintiffs have withheld these documents for many months. These documents should be produced before any live testimony at a *Daubert* hearing.

Moreover, Plaintiffs continue to withhold (as they have for months) the documents relating to their experts who were not disclosed, did not file expert reports, and thus were not deposed. When Plaintiffs served the expert opinions of these undisclosed experts, Defendants immediately objected and, without waiving those objections, asked Plaintiffs to produce the Rule 26 "considered" materials relating to these undisclosed experts. *See Ex. B*. Plaintiffs agreed to produce those materials, *see Ex. B*, but continue to withhold the materials to this day.¹

¹ This issue will become moot if the Court strikes the opinions of Plaintiffs' undisclosed experts, and motions are pending seeking that relief. *See, e.g.* Dkt. #2241.

IV. Addressing Defendants' *Daubert* Motions First Will Conserve Resources

Plaintiffs' proposed order of argument creates inefficiencies. Plaintiffs seek to put their *Daubert* motions first in the order of hearing. *See* Dkt #2337. Defendants defer to the Court's wishes on how argument should be scheduled, but note that the resolution of Defendants' motions may moot a number of Plaintiffs' motions. For example, Defendants have moved to exclude the testimony of Dr. Olsen. *See* Dkt. #2082. Plaintiffs moved to exclude the testimony of three witnesses who explain why Dr. Olsen's work is unreliable (Drs. Cowan, Johnson, and Murphy). *See* Dkt #2083, 2072, 2074. The Court's ruling on the defense motions may obviate the need to consider other motions on the same topic.

CONCLUSION

For the foregoing reasons, Defendants request that the Court deny Plaintiffs' requests to convert the *Daubert* argument into an evidentiary hearing and re-order the arguments.

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